

**CONTRACT FOR \_\_\_\_\_**

**BETWEEN**

**DEPARTMENT OF \_\_\_\_\_**

**AND**

This model Contract is to be used for purchasing services. If you want to purchase goods, you should consult with the Attorney General's Office. If you are not sure whether you are purchasing goods or services, you should consult with your agency's attorney.

11 IAC chapters 106 and 107 define services as:

"Service" or "services" means work performed for a department or establishment or for its clients by a service provider and includes, but is not limited to:

1. Professional or technical expertise provided by a consultant, advisor or other technical or service provider to accomplish a specific study, review, project, task, or other work as described in the scope of work. By way of example and not by limitation, these services may include the following: accounting services; aerial surveys; aerial mapping and seeding; appraisal services; analysis and assessment of processes, programs, fiscal impact compliance, systems and the like; auditing services; communications services; services of peer reviewers, attorneys, financial advisors, and expert witnesses for litigation; architectural services; information technology consulting services; services of investment advisors and managers; marketing services; policy development and recommendations; program development; public involvement services and strategies; research services; scientific and related technical services; software development and system design; and the services of underwriters, physicians, pharmacists, engineers, and architects; or

2. Services provided by a vendor to accomplish routine functions. These services contribute to the day-to-day operations of state government. By way of example and not by limitation, these services may include the following: ambulance service; charter service; boiler testing; bookkeeping service; building alarm systems service and repair; commercial laundry service; communications systems installations servicing and repair; court reporting and transcription services; engraving service; equipment or machine installation; preventive maintenance, inspection, calibration and repair; heating ventilation and air conditioning (HVAC) system maintenance service; janitorial service; painting; pest and weed control service; grounds maintenance, mowing, parking lot sweeping and snow removal service; towing service; translation services; and travel service.

Contracts for services may be awarded to individuals, joint ventures, partnerships, corporations, or non-profit organizations. Services are generally performed off-site whenever possible at an established place of business.

This model Contract for services is annotated with comments explaining and commenting upon various provisions of the contract. The purpose of the annotations is to explain the reasons why the provision is important, drafting considerations, suggested alternative language, and other pitfalls contract drafting.

This model Contract for services is designed to be used for a wide variety of personal services with minimal changes except as provided for in the annotations. This Contract is also designed to comply with Executive Order Number 25 and 11 IAC chapters 106 and 107, which apply to service contracts with a starting date on or after October 1, 2002.

Before using this model Contract, you should make sure that you have complied with any

relevant competitive bidding process.

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This Contract for **[type of services]** Services is between **[name of the agency]** and **[name of the contractor]**. The parties agree as follows:

#### GENERAL NOTES/INSTRUCTIONS

The model contract may be changed from time to time. Please always refer to the most recent version that will be available at \_\_\_\_\_.

- If you intend to request a contract review by the AG's Office, the review must be done prior to obtaining any signatures on the Contract. Once signatures are obtained, the Contract is "executed," and any subsequent review by the AG's office serves no purpose.
- The Contractor's signature should be obtained prior to the Agency signature. Do not send a signed Contract to the Contractor for their signature. The Agency should be the last party to sign the Contract. Provisions in the Contract may change as a result of negotiations; therefore, signatures should occur after negotiations.
- All parties to the Contract must sign amendments to an executed Contract.
- 11 Iowa Administrative Code rule 106.12(2)(18), which applies to service contracts with a starting date on or after October 1, 2002, requires that all parties to the contract must sign the contract before performance of services begins, unless the contract was the result of an emergency procurement.

Throughout the model contract you will find words or instructions in bold brackets, for example: **[Date]**. This indicates that you must enter some information (fill in the blank), or change the existing information. After you have entered the necessary information, remove the brackets and bold type. Other **bold** type, without the brackets, represents either a heading or information that is being emphasized.

Much of the language in this model contract is standard and required. Do not alter or delete any language unless an annotation indicates the language is optional, or you have contacted your legal counsel and received authorization for changes. If language is not applicable to your contract, you should delete such language, as opposed to adding a "Not Applicable" memo.

## SECTION 1. IDENTITY OF THE PARTIES

**1.1** The Iowa **[name of Agency entering into the Contract]** ("Agency") is authorized to enter into this Contract. Agency's address is **[Agency's address]**.

**1.2 [full legal name of the Contractor]** (“Contractor”) **[the Contractor’s business form]** is organized under the laws of the state of **[state where the Contractor is organized or incorporated]** and authorized to do business in the state of Iowa. The Contractor’s address is **[the Contractor’s address]**.

You should make sure the Agency identified in Section 1.1 is the appropriate entity with legal authority to enter into the Contract.

The model Contract refers to the other party as “Contractor.” Other terms, such as “Provider” or “Vendor” or short form of the party’s name, can be used instead, depending upon your preference, however, pick a term and use that term consistently throughout the Contract.

It is important to identify the Contractor’s business form such as a sole proprietorship, limited liability partnership, limited liability corporation, professional corporation, corporation or nonprofit corporation. Please note, however, that there is no requirement that the Contractor must be an Iowa-based business.

## **SECTION 2. PURPOSE**

The parties have entered into this Contract for the purpose of retaining the Contractor to provide: **[enter a brief description of the product or services to be provided]**.

This section should be a brief summary of the services to be provided by the Contractor.

## **SECTION 3. DURATION OF CONTRACT**

The term of this Contract shall be **[enter beginning date]** through **[enter ending date]**, unless terminated earlier in accordance with the Termination section of this Contract. The Agency shall have the option to renew this Contract for up to **[enter number of possible additional 1 year extensions]** additional one (1)-year extensions by giving the Contractor written notice of the extension decision at least sixty (60) days prior to the expiration of the initial term or renewal term.

11 IAC 106.11(18) provides that “[a] service contract, including all optional renewals, shall not exceed a term of six years unless the department or establishment obtains a waiver of this provision pursuant to 106.16(18).” One reason state agencies use the initial term and renewal term approach is that it gives the agency the ability to gracefully extricate itself from a bad arrangement by not renewing the Contract after the initial term. If your Contract resulted from a competitive bidding process, the term of the Contract and any allowable extensions must be as stated in the RFP.

## SECTION 4. DEFINITIONS

The following words shall be defined as set forth below:

Include this section in the Contract, especially if the scope of services section includes terms not defined within the Contract or RFP (if applicable) that non-agency persons may not be familiar with, especially acronyms. Include all definitions within this section in alphabetical order. **Once you have defined a term it must be capitalized throughout the remainder of the contract text.** Below are examples of the types of definitions that may be necessary and an acceptable format. These examples are for explanatory purposes only. Add and delete as necessary to fit your particular Contract. If this definition section is not necessary, delete it.

**4.1 Bureau** shall mean the ...

**4.2 Contract** shall mean all parts of this Contract including, without limitation and by way of example, the first portion of this Contract and the exhibits and attachments to this Contract.

**4.3 Contract Administrator** shall mean the primary point of contact for the State and the liaison between the Agency and the Contractor.

**4.4 Proposal** shall mean the response by the Contractor to the RFP No. **[enter RFP number]**, including any attachments, appendices, clarifications, addenda or other writings.

**4.5 RFP** shall mean Request for Proposal No. **[enter RFP number]**, as issued by the Agency on **[enter date issued]**, including any attachments, appendices, clarifications, addenda or other writings.

## SECTION 5. SCOPE OF SERVICES

This is one of the most important sections of the Contract. This section should contain a clear explanation of what work the Contractor will be doing as well as identify reporting requirements (what reports, format, how often, to whom) and performance measures. Indicate if regular meetings between the Contractor and Agency staff are required, how often etc. If there is to be approval of performance by the Agency, this should also be included here. If the Contractor must provide a right of appeal to clients, add this as a requirement to this section. If maintenance support and training is required of the Contractor, add the specifics of these to this section.

The Scope of Services must be complete and descriptive of the performance requirements since it will include standard by which the Contractor's performance will be measured. Failure to do so will make it more difficult for the Agency to enforce the expectations of the Agency.

The Accountable Government Act requires Agencies to include clauses in three interrelated categories in their service contracts: (1) payment terms, (2) monitoring performance, (3) and reviewing performance. Because Agencies need to tie the amount or basis for paying a Contractor to the Contractor's performance under the contract, the scope of services should precisely describe the scope and timing of the work to be performed under the contract and the criteria under which satisfactory performance will be measured. The scope of services section is also often the most logical place to



include monitoring and review provisions because those provisions will sometimes require activities and information from the Contractor for the Agency to monitor and review the Contractor's performance. Chapter 10 of the Service Contracting Guide provides additional information on the clauses required by the Accountable Government Act.

When the Contract ensues from an RFP, do not simply refer to the bid proposal. Define the scope of services in detail and include language incorporating the RFP and the bid proposal as a part of the Contract in the Contract Administration section.

**If the scope of services is contained in an attachment/exhibit rather than the body of the Contract, be sure to attach the final version of that attachment/exhibit to the Contract. If the scope of services is included in the body of the Contract rather than attached as an exhibit, delete the bracketed sentence in bold in Section 5.1.**

The format below is simply an example.

**5.1 Scope of Services.** The Contractor shall provide the following services in accordance with the defined performance criteria as set forth below **[or in Exhibit [A] attached hereto and made part of this Contract by this reference]**.

**5.1.1**

**5.1.2**

**5.1.3**

**5.2 Industry Standards.** Services rendered pursuant to this Contract shall be performed in a professional and workmanlike manner in accordance with the terms of this Contract and the standards of performance considered generally acceptable in the **[insert type of industry]** for similar tasks and projects. In the absence of a detailed specification for the performance of any portion of this Contract, the parties agree that the applicable specification shall be the generally accepted industry standard.

If you are buying services from an industry that has generally accepted standards of services, you should use this subsection. If there are no accepted industry standards for the type of services you are buying, you may delete this subsection.

**5.X Key Personnel.** In some circumstances it will be important to the Agency that certain key people identified in the Contractor's proposal to the Agency actually do the work on the Contract or remain involved in the project throughout the term of the Contract. IF this is the case, you may want to address the issue in the Contract. Any contractual provisions on the issue, however, must be very carefully drafted to so that the clause does not undermine the Contractor's status as an independent contractor. If you believe the continued involvement of key contractor personnel is important for your particular contract, you should ask your Agency's Assistant Attorney General to help you draft an appropriate provision.

**5.3 Non-Exclusive Rights.** This Contract is not exclusive. The Agency reserves the right to select other contractors to provide services similar or identical to the Scope of Services described in this Contract during the term of this Contract.

This clause is necessary to alert the Contractor that this Contract does not guaranty that the Contractor is the exclusive provider of the service for the agency. It is particularly important to include this provision in performance based contracts. **DO NOT ALTER THIS PROVISION UNLESS YOU CONSULT WITH YOUR AGENCY'S ATTORNEY FIRST.**

## SECTION 6. COMPENSATION

There are many different types of compensation arrangements available for use in services contracts. The Accountable Government Act requires Agencies to include a payment clause that ties payment to performance unless the Agency obtains special permission to use different terms and conditions in its contract(s). The rules implementing the Accountable Government Act provide a non-exhaustive list of examples of the types of clauses that may be used to satisfy this requirement. This list includes provisions that provide for (1) a base fee and an at risk fee, (2) a minimum payment plus incentives and/or disincentives, (3) a straight contingency fee, (4) a retainage, (5) a base fee plus a contingent fee, or (6) another payment clause that effectively ties payment to the Contractor's performance under the contract. Chapter 10 of the Service Contracting Guide provides additional information on the different types of payment clauses.

When drafting compensation provisions, keep in mind that the State of Iowa generally pays for goods and services in arrears—after the goods or services have been provided. You will also generally be more able to effectively tie the payment clause to the monitoring and review clauses if you do not pay for the services in advance. Some Contractors may try to convince the Agency to “prepay” or pay in advance for services by offering discounts if prepayment is selected. Such a request is problematic. First, the Iowa Code and the Iowa Department of Administrative Services, State Accounting Enterprise, rules limit the ability of state agencies to prepay for services. (See, **2003 Iowa Acts, House File 534, section 514 Iowa Admin. Code Chapter 210**). Second, Contractors can and do go out of business without repaying any amounts prepaid. Take the following example to illustrate this point: The Agency pays the Contractor in advance for three months of services. The Contractor goes out of business and files a Chapter 7 bankruptcy twenty days later. The Agency will likely have to pay twice for the same services.

**6.1 Pricing.** The Contractor will be paid for the services described in the Scope of Services [describe how much the Contractor will be paid]. [If you would prefer, you may attach a pricing exhibit to the Contract describing the cost for services. The pricing for the services provided under the Contract are set forth in Exhibit B.]

**6.2 Billings.** The Contractor shall submit, on a [frequency basis, i.e. monthly, quarterly, etc.], an invoice for services rendered in accordance with this Contract. The invoice shall comply with all applicable rules concerning payment of such claims. The Agency shall pay all approved invoices in arrears and in conformance with **2003 Iowa Acts, House File 534, section 514** and **701 Iowa Administrative Code 201.1(2)**. The Agency may pay in less than sixty (60) days, as provided in **2003 Iowa Acts, House File 534, section 514**. However, an election to pay in less than sixty (60) days shall not act as an implied waiver of **2003 Iowa Acts, House File 534, section 514**.

Unless otherwise agreed in writing by the parties, the Contractor shall not be entitled to receive any other payment or compensation from the State for any goods or services provided by or on behalf of the Contractor under this Contract. The Contractor shall be solely responsible for paying all costs,

expenses and charges it incurs in connection with its performance under this Contract.

While there is no statute or administrative rule imposing a monthly billing, monthly billings is a standard provision in government contracts. On a practical level, monthly billings permit the Agency to monitor the Contractor's progress on satisfying its contractual obligations. In other words, monthly billings can be one tool to check the Contractor's progress on completing the contract before it is too late to salvage the project.

**6.3 Delay of Payment Due to Contractor's Failure.** If the Agency in good faith determines that the Contractor has failed to perform or deliver any service or product as required by this Contract, the Contractor shall not be entitled to any compensation under this Contract until such service or product is performed or delivered. In this event, the Agency may withhold that portion of the Contractor's compensation, which represents payment for service or product that was not performed or delivered.

**6.4 Set-Off Against Sums Owed by the Contractor.** In the event that the Contractor owes the State any sum under the terms of this Contract, any other Contract, pursuant to any judgment, or pursuant to any lack the State may set off the sum owed to the State against any sum owed by the State to the Contractor in the State's sole discretion, unless otherwise required by law. The Contractor agrees that this provision constitutes proper and timely notice under the law of setoff.

## **SECTION 7. TERMINATION**

These provisions deal with the ability of the Agency to terminate the Contract before its natural expiration when the Contractor breaches the Contract. It is very important that such a provision be included in the Contract to establish what constitutes an event of default and what remedies are available to the Agency in the event of default.

**7.1 Immediate Termination by the Agency.** The Agency may terminate this Contract for any of the following reasons effective immediately without advance notice:

**7.1.1** In the event the Contractor is required to be certified or licensed as a condition precedent to providing services, the revocation or loss of such license or certification will result in immediate termination of the Contract effective as of the date on which the license or certification is no longer in effect;

**7.1.2** The Agency determines that the actions, or failure to act, of the Contractor, its agents, employees or subcontractors have caused, or reasonably could cause, a client's life, health or safety to be jeopardized;

**7.1.3** The Contractor fails to comply with confidentiality laws or provisions;

**7.1.4** The Contractor furnished any statement, representation or certification in connection with this Contract or the RFP which is materially false, deceptive, incorrect or incomplete.

**7.2 Termination for Cause.** The occurrence of or any one or more of the following events shall constitute cause for the Agency to declare the Contractor in default of its obligations under this Contract.

**7.2.1** The Contractor fails to perform, to the Agency's satisfaction, any material requirement of this Contract or is in violation of a material provision of this Contract, including, but without limitation, the express warranties made by the Contractor;

**7.2.2** The Agency determines that satisfactory performance of this Contract is substantially endangered or that a default is likely to occur;

**7.2.3** The Contractor fails to make substantial and timely progress toward performance of the Contract.

**7.2.4** The Contractor becomes subject to any bankruptcy or insolvency proceeding under federal or state law to the extent allowed by applicable federal or state law including bankruptcy laws; the Contractor terminates or suspends its business; or the Agency reasonably believes that the Contractor has become insolvent or unable to pay its obligations as they accrue consistent with applicable federal or state law;

**7.2.5** The Contractor has failed to comply with applicable federal, state and local laws, rules, ordinances, regulations and orders when performing within the scope of this Contract; or

**7.2.6** The Contractor has engaged in conduct that has or may expose the Agency to liability, as determined in the Agency's sole discretion.

**7.2.7** The Contractor has infringed any patent, trademark, copyright, traddress or any other intellectual property right.

**7.3 Notice of Default.** If there is a default event caused by the Contractor, the Agency shall provide written notice to the Contractor requesting that the breach or noncompliance be remedied within the period of time specified in the Agency's written notice to the Contractor. If the breach or noncompliance is not remedied by the date of the written notice, the Agency may either:

**7.3.1** Immediately terminate the Contract without additional written notice; or,

**7.3.2** Enforce the terms and conditions of the Contract and seek any legal or equitable remedies.

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If the Contractor defaults, the Agency must provide the Contractor with written notice demanding that the Contractor immediately cure the default. The Agency should decide how much time is reasonable to cure the breach of this Contract and specify the time period the Contractor will have to cure the breach in the written notice to the Contractor. You want to allow the Contractor and the Agency adequate time for notice as well as cure, but you also need to protect the Agency's right to terminate and not incur substantial fees during the notice period. If the Contractor fails to cure the default within the time period specified in the written notice, the Agency can take whatever steps necessary to protect its rights. The notice of default should be prepared or reviewed by legal counsel. The notice should describe in detail the factual basis evidencing the default, the specific contractual provision or provisions that have been breached, and any prior notice given to the Contractor about poor performance. You should bear in mind that the notice of default will become evidence if the dispute goes to court.

The Contractor may ask to have the Contract include provisions for the Contractor to terminate the contract for cause. If the Contractor asks for this, you should consult with legal counsel regarding that request.

**7.4 Termination Upon Notice.** Following, enter the number of days' written notice, the Agency may terminate this Contract in whole or in part without the payment of any penalty or incurring any further obligation to the Contractor. Following termination upon notice, the Contractor shall be entitled to compensation, upon submission of invoices and proper proof of claim, for services provided under this Contract to the Agency up to and including the date of termination.

Under this provision, the Agency may terminate the Contract upon notice without the payment of any penalty or incurring further obligation. Such provisions are common in government contracts (although they are often called "termination for convenience" clauses). Termination upon notice means that the Agency can terminate the Contract for any reason or no reason at all. As drafted, only the Agency may terminate the Contract upon notice. You should decide how many days' notice is appropriate given the services you are buying with the Contract. You should consider how much time you will need to find a replacement contractor, if any, when deciding how many days' notice is appropriate. Contractors may object to this provision and request that they be given the ability to terminate the Contract upon notice as well. In this event, you should consult with your legal counsel.

**7.5 Termination Due to Lack of Funds or Change in Law.** The Agency shall have the right to terminate this Contract without penalty by giving sixty (60) days' written notice to the Contractor as a result of any of the following:

**7.5.1** Adequate funds are not appropriated or granted to allow the Agency to operate as required and to fulfill its obligations under this Contract;

**7.5.2** Funds are de-appropriated or not allocated or if funds needed by the Agency, at the Agency's sole discretion, are insufficient for any reason;

**7.5.3** The Agency's authorization to operate is withdrawn or there is a material alteration in the programs administered by the Agency;

**7.5.4** The Agency's duties are substantially modified.

There are significant constitutional limitations on the ability of state agencies to enter into contracts that cross fiscal years. The Iowa Constitution prohibits state agencies from binding the General Assembly to appropriate funds in the future. Article VII, Section 2 & 5 of the Iowa Constitution; *Bachtell v. City of Waterloo*, 200 N.W.2d 548 (Iowa 1972). Use of a non-appropriation provision is the best method to avoid a potential constitutional violation. The contractors who have not done business with the State of Iowa before usually balk at the non-appropriation provision. However, the provision must be included in all multi-year contracts without exception.

Please note that the ability to terminate the Contract under this provision is not limited to just non-appropriation situations. The Agency has the ability to terminate the Contract in the event that there has been a statutory change impacting the ability of the Agency to continue performance of the contract.

**7.6 Remedies of the Contractor in Event of Termination by the Agency.** In the event of termination of this Contract for any reason by the Agency, the Agency shall pay only those amounts, if any, due and owing to the Contractor for services actually rendered up to and including the date of termination of the Contract and for which the Agency is obligated to pay pursuant to this Contract. Payment will be made only upon submission of invoices and proper proof of the Contractor's claim. This provision in no way limits the remedies available to the Agency under this Contract in the event of termination. However, the Agency shall not be liable for any of the following costs:

**7.6.1** The payment of unemployment compensation to the Contractor's employees;

**7.6.2** The payment of workers' compensation claims, which occur during the Contract or extend beyond the date on which the Contract terminates;

**7.6.3** Any costs incurred by the Contractor in its performance of the Contract, including, but not limited to, startup costs, overhead or other costs associated with the performance of the Contract;

**7.6.4** Any taxes that may be owed by the Contractor in connection with the performance of this Contract, including, but not limited to, sales taxes, excise taxes, use taxes, income taxes or property taxes.

This section sets forth the limited remedies of a contractor in the event the Contract is terminated due to lack of funds or change in the law. A contractor's remedy is limited to payment for services completed prior to termination. No other damages, such as claims for lost profits, are permitted. Such a limitation on damages is problematic for some contractors, especially those contractors who are required to make significant up-front investments at the beginning of the contract and those costs are recovered over the term of the Contract. A good example is the landlord who is required to make costly changes to the leased premises; the cost of leasehold improvements are amortized over the life of the lease and those costs would not be paid in the event that the Contract is terminated under Section 7.6. One solution suggested by contractors is that the Agency agree to pay all or a percentage of the up-front costs in the event the Contract is terminated under Section 7.6. Such requests are problematic because they can be construed by the courts as being so burdensome that the Agency would never exercise its right to terminate the Contract, making the non-appropriation provision illusory.

**7.7 The Contractor's Termination Duties.** The Contractor upon receipt of notice of termination or upon request of the Agency, shall:

**7.7.1** Cease work under this Contract and take all necessary or appropriate steps to limit disbursements and minimize costs, and furnish a report within thirty (30) days of the date of notice of termination, describing the status of all work under the Contract, including, without limitation, results accomplished, conclusions resulting therefrom, any other matters the Agency may require.

**7.7.2** Immediately cease using and return to the Agency any personal property or materials, whether tangible or intangible, provided by the Agency to the Contractor.

**7.7.3** Comply with the Agency's instructions for the timely transfer of any active files and work product produced by the Contractor under this Contract.

**7.7.4** Cooperate in good faith with the Agency, its employees, agents and contractors during the transition period between the notification of termination and the substitution of any replacement contractor.

**7.7.5** Immediately return to the Agency any payments made by the Agency for services that were not rendered by the Contractor.

## **SECTION 8. CONFIDENTIAL INFORMATION**

Services contractors often have access to or work with confidential data. It is, therefore, important for data privacy issues to be addressed up front and that the Contractor be required to maintain the confidentiality of the data. Some agencies (e.g. the Department of Human Service and the Department of Corrections) have special confidentiality concerns in some of their programs. If this is the case with your agency, you should consult with your legal counsel to determine whether you should tailor these confidentiality provisions to more closely suit your needs.

**8.1 Access to Confidential Data.** The Contractor's employees, agents and subcontractors may have access to confidential data maintained by the Agency to the extent necessary to carry out its responsibilities under the Contract. The Contractor shall presume that all information received pursuant to this Contract is confidential unless otherwise designated by the Agency. The Contractor shall provide to the Agency a written description of its policies and procedures to safeguard confidential information. Policies of confidentiality shall address, as appropriate, information conveyed in verbal, written, and electronic formats. The Contractor must designate one individual who shall remain the responsible authority in charge of all data collected, used, or disseminated by the Contractor in connection with the performance of the Contract. The Contractor shall provide adequate supervision and training to its agents, employees and subcontractors to ensure compliance with the terms of this Contract. The private or confidential data shall remain the property of the Agency at all times.

**8.2 No Dissemination of Confidential Data.** No confidential data collected, maintained, or used in the course of performance of the Contract shall be disseminated except as authorized by law and with the written consent of the Agency, either during the period of the Contract or thereafter. Any data supplied to or created by the Contractor shall be considered the property of the Agency. The Contractor must return any and all data collected, maintained, created or used in the course of the performance of the Contract in whatever form it is maintained promptly at the request of the Agency.

**8.3 Subpoena.** In the event that a subpoena or other legal process is served upon the Contractor for records containing confidential information, the Contractor shall promptly notify the Agency and cooperate with the Agency in any lawful effort to protect the confidential information.

**8.4 Reporting of Unauthorized Disclosure.** The Contractor shall immediately report to the Agency any unauthorized disclosure of confidential information.

**8.5 Survives Termination.** The Contractor's obligation under this Contract shall survive termination of this Contract.

## **SECTION 9. INDEMNIFICATION**

Among the most important provisions of any contract are those related to indemnification. In the private sector, parties negotiate very broad indemnification provisions that indemnify each other from claims brought by the third parties. In the public sector, on the other hand, there are significant constitutional and statutory limitations on the ability of state agencies to indemnify others. As a general rule, the State of Iowa can only indemnify a contracting party for the acts and omissions of the State of Iowa and its officers, employees and agents. As a result, indemnification provisions found in state contracts raise concern for private sector entities who are accustomed to broad indemnification provisions. State agencies have no ability to broaden the scope of indemnification.

You may wish to delete the indemnification section if the contract is between two state agencies.

**9.1 By the Contractor.** The Contractor agrees to indemnify and hold harmless the State of Iowa and the Agency its officers, employees and agents appointed and elected and volunteers from any and all costs, expenses, losses, claims, damages, liabilities, settlements and judgments, including reasonable value of the time spent by the Attorney General's Office, and the costs and expenses and reasonable attorneys' fees of other counsel required to defend the State of Iowa or the Agency, related to or arising from:

This indemnification provision includes recovery for reasonable attorneys' fees of the Attorney General's Office or other counsel required to defend the Agency. In order to recover attorneys' fees, the contract must so specify. Negotiation tip: there may be times that you may not want to include the ability to recover attorneys' fees in an indemnification provision, principally because the Agency does not want to indemnify the Contractor for attorneys' fees.

**9.1.1** Any

breach of this Contract;

Some Contractors object to indemnifying the State of Iowa for any breach of the Contract. Rather, they want to limit indemnification to negligent acts or omissions. As a practical matter, it is a good idea to have the Contractors indemnify for breaches of the Contract as well as performance or attempted performance of the Contract.

**9.1.2** Any negligent, intentional or wrongful act or omission of the Contractor or any agent or subcontractor utilized or employed by the Contractor;

**9.1.3** The Contractor's performance or attempted performance of this Contract, including any agent or subcontractor utilized or employed by the Contractor;



**9.1.4** Any failure by the Contractor to comply with the compliance with the Law provision of this Contract;

**9.1.5** Any failure by the Contractor to make all reports, payments and withholdings required by federal and state law with respect to social security, employee income and other taxes, fees or costs required by the Contractor to conduct business in the State of Iowa;

**9.1.6** Any infringement of any copyright, trademark, patent, trade dress, or other intellectual property right; or

**9.1.7** Any failure by the Contractor to adhere to the confidentiality provisions of this Contract.

It is a good idea to include indemnification for any infringement of copyright, trademark, patent, trade dress or other intellectual property right, even when the subject matter of the contract does not deal with intellectual property matters. It is possible that the Contractor violated intellectual property laws and incorporated protected information in the work product submitted to the Agency.

## **9.2 Indemnification by the State**

The State shall, only to the extent consistent with and permitted by Article VII, Section 1 of the Iowa Constitution and Iowa Code Chapter 669, indemnify the Contractor from and against any claim, as defined in Iowa Code Section 669.2, caused directly by the negligent or wrongful acts or omissions of any employee of the State while acting within the scope of the employee's office or employment in connection with the performance of this Agreement. Contractor agrees that any claim for which indemnification is sought pursuant to this Section\_\_ will be subject to the provisions of Iowa Code Chapter 669 and 543 Iowa Admin. Code 1, including, without limitation, those provisions which address the making and filing of claims.

If the State makes any indemnity payments to the Contractor pursuant to this Section \_\_and the contractor thereafter collects or recovers all or a portion of such amounts from any person or third party, including from any insurance carrier, Contractor shall promptly repay such collected or recovered amounts to the State.

Annotation: Generally, state agencies should not agree to indemnify contractors or third parties in state contracts. The Iowa constitution and Iowa Code Chapter 669 (the Iowa Tort Claims Act) severely limit the ability of the state and state agencies to indemnify contractors. State agencies should use the indemnification provision set out above *only when necessary*.

**9.3 Survives Termination.** Indemnification obligation of the parties shall survive termination of this Contract.

## **SECTION 10. INSURANCE**

As a general matter, a Contractor should be required to provide insurance to protect the Agency from the Contractor's negligence. The Contractor, not the Agency, should be financially responsible for its negligence. Insurance is one of the best ways to make sure the Contractor has sufficient financial resources to protect the Agency in the event of loss.

If the contract is between two state agencies, you may delete the insurance

provisions because the State is self-insured.

**10.1 Insurance Requirements.** The Contractor, and any subcontractor, shall maintain in full force and effect, with insurance companies licensed by the State of Iowa, at the contractor's expense, insurance covering its work during the entire term of this Contract and any extensions or renewals. The Contractor's insurance shall, among other things, be occurrence based and shall insure against any loss or damage resulting from or related to the Contractor's performance of this Contract regardless of the date the claim is filed or expiration of the policy. The State of Iowa and the Agency shall be named as additional insureds or loss payees, or the Contractor shall obtain an endorsement to the same effect, as applicable.

This provision requires an occurrence-based insurance policy. Please keep in mind that some, if not most, insurance policies provide coverage on the claims-made basis instead of an occurrence basis. Claims-made insurance means that coverage is determined by the policy in place on the date the claim is made instead of the policy in place on the date the loss or damage occurred. Most insurance policies, absent a prior acts rider, deny coverage for actions that arose prior to the effective date of the insurance policy.

The State of Iowa and the Agency should be additional named insureds on the policies. Additional named insureds are entitled to receive notice of cancellation and have other rights. Unless the State of Iowa and the Agency receive notice of cancellation, the Contractor could obtain a certificate of insurance at the start of the contract and shortly thereafter cancel the insurance policy, thereby effectively defeating the reason for requiring insurance.

**ALTERNATIVE CLAUSE:** Sometimes you may have State property on the premises of the Contractor, for example, files. You want the Contractor's insurance coverage to pay for any loss of this property. You can insert the following clause to cover this contingency:

"The policies shall also provide coverage for damages to the State's property on the Contractor's, or any contractor's, premises or premises under the control of the Contractor or any subcontractor."

**10.2 Types and Amounts of Insurance Required.** Unless otherwise requested by the Agency in writing, the Contractor shall cause to be issued the insurance coverages set forth below:

TYPE OF INSURANCE	LIMIT	AMOUNT
General Liability (including contractual liability) written on an occurrence basis	General Aggregate	\$2 Million
	Product Completed Operations Aggregate	\$1 Million
	Personal Injury	\$1 Million
	Each Occurrence	\$1 Million
Automobile Liability (including any auto, hired autos, and non-owned autos)	Combined Single Limit	\$1 Million
Excess Liability, Umbrella Form	Each Occurrence	\$1 Million

	Aggregate	\$1 Million
Workers Compensation and Employer Liability	As required by Iowa law	As required by Iowa law
Property Damage	Each Occurrence	\$1 Million
	Aggregate	\$1 Million

The amount of insurance that should be required is a policy decision based upon the type of services being provided and the risks posed by the services being provided. The higher the risk, the higher the policy limits. The table above provides an example only. You should modify the insurance requirements to meet the needs of your particular contract.

The table above provides a brief description of the coverage provided under each type of insurance. If a particular type of insurance is not applicable to the contract, the specific language can be deleted from the contract.

If the contract is with a professional, professional liability insurance should be included.

Depending upon the nature of services, a project specific professional liability insurance policy should be considered. Project specific insurance coverage provides insurance dedicated solely to the particular project and avoids the problems associated with depleted insurance limits. General liability insurance policy limits can be depleted by other claims resulting in no insurance proceeds for other claims. Policy specific insurance solves this problem by having the policy dedicated solely to a particular project.

**ALTERNATIVE CLAUSE:** Additionally, you may want to require an extended discovery period for the project specific insurance. An extended discovery period is designed to address the claims-made nature of professional liability insurance. Sample language is set forth below:

“The Contractor shall procure and maintain a project specific professional liability insurance policy dedicated solely to the Project. Said insurance shall provide \$ \_\_\_\_\_ in coverage and a year extended discovery period following completion of the Project.”

**10.3 Certificates of Coverage.** All insurance policies required by this Contract shall remain in full force and effect during the entire term of this Contract and any extensions or renewals thereof and shall not be canceled or amended except with the advance written approval of the Agency. The Contractor shall submit certificates of insurance, which indicate coverage and notice provisions as required by this Contract, to the Agency upon execution of this Contract. The certificates shall be subject to approval by the Agency. The insurer shall state in the certificate that no cancellation of the insurance will be made without at least thirty (30) days’ prior written notice to the Agency. Approval of the insurance certificates by the Agency shall not relieve the Contractor of any obligation under this Contract.

An often overlooked contract management issue is the requirement that the Contractor provide certificates of insurance. It is imperative that the Agency

obtain and keep secure certificates and insurance.

#### **ALTERNATIVE CLAUSE:**

Sometimes Contractors will ask the Agency to provide insurance as well. Generally the State does not purchase insurance because it is self-insured. If the Contractor insists that the Contract address this issue, you can include the following language:

**“Self-Insured:** Pursuant to Iowa Code chapter 669, the Agency and the State of Iowa are self-insured against all risks and hazards relating to this Contract. No separate fund has been established to provide self-insurance, and the State of Iowa is not obligated to establish any such fund during the term of this Contract.

## **SECTION 11. BONDS**

**11.1 Fidelity Bond.** The Contractor shall, within [enter number of days] days of the effective date of this Contract, post a fidelity bond in an amount equal to \$[enter dollar amount] and provide a copy of the bond to the Agency. The Contractor shall pay the cost of the bond. The bond shall provide funds to the Agency in the event that the Agency or the State of Iowa suffers any liability, loss, damage or expense as a result of any fraudulent or dishonest act or omission of the Contractor or any subcontractor or any officer, director, employee or agent of the Contractor or any subcontractor or any parent or subsidiary corporation of the Contractor or any subcontractor related to the performance of this Contract. The bond shall be in a form customarily used in the industry, and shall be written by a surety authorized to do business in Iowa and that is acceptable to the Agency. The bond shall be in effect at all times during the term of this Contract and any extensions or renewals thereof and for one year following the conclusion of the Contract. The bond shall provide funds to the Agency for any fraudulent or dishonest act or omission, which occurs during the term of the bond regardless of the date the act or omission is discovered, or a claim is made. The Contractor warrants that it will maintain the required fidelity bond coverage as described herein without any lapse in coverage. Failure on the part of the Contractor to furnish such a bond in the time stated, or to maintain the bond in full force and effect during the term of the Contract and any extension or renewal thereof, shall be a material breach of the contract and shall be considered cause for the Agency to declare the contractor in default under this Contract. The Agency's receipt of such bond or other proof of coverage does not constitute approval of the bond coverage nor does the bond relieve the Contractor from the faithful and honest performance of this Contract.

If the Contractor will be responsible for handling the Agency's money (i.e. fiscal agents), or have access to the Agency's bank accounts or banking information, a fidelity bond requirement should be included. The amount of the fidelity bond is flexible and should be based on the potential dollar amount of loss. To determine the appropriate amount, you should consider how much money the Contractor has access to during the duration of the Contract. For a fiscal agent, the bond should equal the highest amount of money the Contractor will handle during the life of the Contract. If the bond is designed to protect the release of confidential information, the Agency should estimate the damages and make that the amount of the bond. The Agency is responsible for obtaining a copy of the bond certificate as proof of coverage.

**11.2 Performance Bond.** The Contractor shall post a performance bond in an amount equal to

\$[enter dollar amount] and provide a copy of the bond to the Agency within (10) days of execution of this Contract. The Contractor shall pay the cost of the bond. In the event that the Contractor or any subcontractor or any officer, director, employee or agent of the Contractor or any subcontractor or any parent or subsidiary corporation of the Contractor or any subcontractor fails to fully and faithfully perform each material requirement of this Contract, including without limitation the Contractor's obligation to indemnify the Agency and pay damages to the Agency, the performance bond shall be forfeited to the Agency. The bond shall be in a form customarily used in the [enter the relevant industry] industry and shall be written by a surety authorized to do business in Iowa and that is acceptable to the Agency. The bond shall be in effect at all times during the term of this Contract and any extensions or renewals thereof and for one (1) year following the conclusion of the Contract. The Contractor warrants that it will maintain the required performance bond coverage as described herein without any lapse in coverage. A lapse of the bond will be a material breach of the Contract and shall be considered cause for the Agency to declare the Contractor in default under this Contract.

A performance bond should be required when the service provided is essential, the Agency will suffer damages for non-performance, and it will cost time and money to replace the Contractor. It is a good idea to include a performance bond in construction contracts and contracts for system development. There may be other instances in which a performance bond is advisable. As you consider whether to include a performance bond requirement in the contract, and how large the bond should be, you should consider what the Agency's damages would be if the Contractor does not perform the contract. You should also think about how long it will take the Agency to replace the thing the Contractor did not supply, and what it will cost to do that. One rule of thumb is that the amount of the bond may be based on the size of the contract. For example, if the contract is for \$5 million, then the bond should be equal to \$5 million. If the Contract is a multi-year contract, the bond can equal the value of the Contract for one (1) year, but the bond must be renewed each year and the Agency must check and determine that the renewed bond will equal the value of the work for that year. The bond can also be placed on a sliding scale and reduced as the Contractor hits each benchmark for successful performance of the Contract. You should consult with the Attorney General's office if you have any questions about the size of performance bond you should require or whether you should require a performance bond for a contract that is not a construction or a system development contract.

## **SECTION 12. PROJECT MANAGEMENT AND REPORTING**

**12.1 Project Manager.** At the time of execution of this Contract, each party shall designate, in writing, a Project Manager to serve until the expiration of this Contract or the designation of a substitute Project Manager. During the term of this Contract, each Project Manager shall be available to meet monthly, unless otherwise mutually agreed, to review and plan the services being provided under this Contract.

**12.2 Review Meetings.** During the review meetings the Project Managers shall discuss progress made by the Contractor in the performance of this Contract. Each party shall provide a status report, as desired by a Project Manager, listing any problem or concern encountered since the last meeting. Records of such reports and other communications issued in writing during the course of Contract performance shall be maintained by each party.

**12.3 Reports.** At the next scheduled meeting after which any party has identified in writing a problem, the party responsible for resolving the problem shall provide a report setting forth activities undertaken, or to be undertaken, to resolve the problem, together with the anticipated completion dates of such activities. Any party may recommend alternative courses of action or changes that will facilitate problem resolution. For as long as a problem remains unresolved, written reports shall identify:

**12.3.1** Any event not within the control of the Contractor or the Agency that accounts for the

problem;

**12.3.2** Modifications to the Contract agreed to by the parties in order to remedy or solve the identified problem;

**12.3.3** Damages incurred as a result of any party's failure to perform its obligations under this Contract; and

**12.3.4** Any request or demand for services by one party that another party believes are not included within the terms of this Contract.

It is important for the status reports to accurately reflect any problems or concerns the Agency has with the Contractor. Status reports can then be used to track a Contractor's efforts to solve the problems and concerns. Status reports can also be used to document the factual basis for default or waive any other remedy.

**12.4 Problem Reporting Omissions.** The Agency's acceptance of a problem report shall not relieve the Contractor of any obligation under this Contract or waive any other remedy under this Contract or at law or equity that the Agency may have. The Agency's failure to identify the extent of a problem or the extent of damages incurred as a result of a problem shall not act as a waiver of performance under this Contract. Where other provisions of this Contract require notification of an event in writing, the written report shall be considered a valid notice under this Contract provided the parties required to receive notice are notified.

**12.5 Change Order Procedure.** The Agency may at any time request a modification to the Scope of Services using a Change Order. The following procedures for a change order shall be followed:

**12.5.1 Written Request.** The Agency shall specify in writing the desired modifications to the same degree of specificity as in the original Scope of Services.

**12.5.2 The Contractor's Response.** The Contractor shall submit to the Agency a time and cost estimate for the requested Change Order within five (5) business days of receiving the Change Order Request.

**12.5.3 Acceptance of the Contractor Estimate.** If the Agency accepts the estimate presented by the Contractor within five (5) business days of receiving the Contractor's response, the Contractor shall perform the modified services subject to the time and cost estimates included in the Contractor response. The Contractor's performance and the modified services shall be governed by the terms and conditions of this Contract.

Allowing five (5) business days is only a suggestion. Adjust the number of days as necessary to fit your circumstances.

**12.5.4 Adjustment to Compensation.** The parties acknowledge that a Change Order for this Contract may or may not entitle the Contractor to an equitable adjustment in the Contractor's compensation or the performance deadlines under this Contract.

## **SECTION 13. LIMITATION OF LIABILITY**

The Contractor expressly acknowledges that the **[name of project or services]** is subject to legislative change by either the federal or state government. Should either legislative body enact

measures which alter the **[name of project or services]** the Contractor shall not hold the Agency liable in any manner for the resulting changes. The Agency shall use best efforts to provide thirty (30) days' written notice to the Contractor of any legislative change. During the thirty (30)-day period, the parties shall meet and make a good faith effort to agree upon changes to the Contract to address the legislative change. Nothing in this Subsection shall affect or impair the Agency's right to terminate the Contract pursuant to the termination provisions.

## **SECTION 14. INTELLECTUAL PROPERTY, PATENT AND COPYRIGHT**

You may need to include several types of provisions in the contract which, among other things, address the respective intellectual property rights of the parties (e.g., copyright, patent, trademark, trade dress, trade secret) and related issues whenever Contractors are creating, producing or developing materials or works of any kind for the state, such as software, artwork, photographs, training materials, manuals, program or technical writing, advertising copy or promotional materials for the state. Such provisions may or should address: ownership of the work (e.g, whether ownership of the work and all intellectual property rights therein will be assigned and conveyed to the state or retained by Contractor), licensing and other rights (e.g., whether the state will have the right to use, copy, reproduce, modify, prepare derivative works based on, distribute, display, and demonstrate the work, etc.), representations and warranties of the Contractor (e.g., that the Contractor owns or has secured all rights in and to the work necessary to convey the work or grant various rights therein to the state, that no third party's intellectual property rights have or will be infringed or trade secrets have been misappropriated, that there is no pending or threatened litigation against the contractor concerning infringement or misappropriation, that the work and/or Contractors development thereof will comply with applicable laws, and that the work will conform to certain specifications and standards, that the work is a wholly original work of authorship of contractor), indemnification of the state and other remedies in the event of intellectual property infringement, remedies for breach of certain warranties, and confidentiality and nondisclosure provisions related to works that are proprietary, etc.

The types of provisions you may need will vary greatly depending on the nature of the contract. Consequently, you should consult with your Agency's Assistant Attorney General to help you determine what provisions are necessary and to make sure that you have adequately addressed intellectual property and related issues in your contract.

## **SECTION 15. WARRANTIES**

### **15.1 Construction of Warranties Expressed in this Contract with Warranties Implied by Law.**

All warranties made by the Contractor in all provisions of this Contract and the Proposal by the Contractor, whether or not this Contract specifically denominates the Contractor's promise as a warranty or whether the warranty is created only by the Contractor's affirmation or promise, or is created by a description of the materials and services to be provided, or by provision of samples to the Agency, shall not be construed as limiting or negating any warranty provided by law, including without limitation, warranties which arise through course of dealing or usage of trade. The warranties expressed in this Contract are intended to modify the warranties implied by law only to the extent that they expand the warranties applicable to the goods and services provided by the Contractor. The provisions of this Section apply during the term of this Contract and any extensions or renewals thereof.

**15.2 Concepts, Materials, and Works Produced.** Contractor represents and warrants that all the concepts, materials and Works produced, or provided to the Agency pursuant to the terms of this Contract shall be wholly original with the Contractor or that the Contractor has secured all applicable interests, rights, licenses, permits or other intellectual property rights in such concepts, materials and

Works. The Contractor represents and warrants that the concepts, materials and Works and the Agency's use of same and the exercise by the Agency of the rights granted by this Contract shall not infringe upon any other work, other than material provided by the Contract to the Contractor to be used as a basis for such materials, or violate the rights of publicity or privacy of, or constitute a libel or slander against, any person, firm or corporation and that the concepts, materials and works will not infringe upon the copyright, trademark, trade name, literary, dramatic, statutory, common law or any other rights of any person, firm or corporation or other entity. The Contractor represents and warrants that it is the owner of or otherwise has the right to use and distribute the software, the materials owned by the Contractor and any other materials, Works and methodologies used in connection with providing the services contemplated by this Contract.

**15.3 Professional Practices.** The Contractor represents and warrants that all of the services to be performed hereunder will be rendered using sound, professional practices and in a competent and professional manner by knowledgeable, trained and qualified personnel.

**15.4 Conformity with Contractual Requirements.** The Contractor represents and warrants that the Works will appear and operate in conformance with the terms and conditions of this Contract.

**15.5 Authority to Enter into Contract.** The Contractor represents and warrants that it has full authority to enter into this Contract and that it has not granted and will not grant any right or interest to any person or entity that might derogate, encumber or interfere with the rights granted to the Agency.

**15.6 Obligations Owed to Third Parties.** The Contractor represents and warrants that all obligations owed to third parties with respect to the activities contemplated to be undertaken by the Contractor pursuant to this Contract are or will be fully satisfied by the Contractor so that the Agency will not have any obligations with respect thereto.

**15.7 Title to Property.** The Contractor represents and warrants that title to any property assigned, conveyed or licensed to the Agency is good and that transfer of title or license to the Agency is rightful and that all property shall be delivered free of any security interest or other lien or encumbrance.

**15.8 Industry Standards.** The Contractor represents and expressly warrants that all aspects of the goods and services provided or used by it shall conform to the standards in the **[name of relevant industry]** in the performance of this Contract.

**15.9 Technology Updates.** The Contractor represents warrants that it shall continually use and integrate the most current and up-to-date technology commercially available.

## **SECTION 16. CONTRACT ADMINISTRATION**

The Contract Administration section includes standard contract language that must be included in every contract. Do not omit sections without first consulting with the Attorney General's office, unless an annotation indicates otherwise. You may find it necessary to add to this section depending on your particular contract. Read each paragraph carefully to make sure that the language is not contrary to other terms or conditions you may have added to the Contract.

**16.1 Independent Contractor.** The status of the Contractor shall be that of an independent contractor. The Contractor, its employees, agents and any subcontractors performing under this Contract are not employees or agents of the State of Iowa or any agency, division or department of the state. Neither the Contractor nor its employees shall be considered employees of the Agency or the State of Iowa for federal or state tax purposes. The Agency will not withhold taxes on behalf of



the Contractor (unless required by law).

It is absolutely essential that the Agency maintain the independent contractor status of the Contractor and its employees. This section is designed to structure the relationship so that the independent contract status of the Contractor is maintained. You should not change this section without first consulting your attorney.

One of the most important factors that courts look at when deciding whether there is an employer-employee relationship is who is responsible for the selection, hiring, supervising, disciplining, firing and compensation of the employees. Therefore, the Contractor, not the Agency, should be solely responsible for these matters. Under no circumstances should the Agency be involved in the Contractor's employment decisions, other than providing the information to the Contractor. The Agency should not make any recommendations about what, if any, disciplinary action the Contractor should take against a staff member. Such decisions must be left up to the Contractor. The Agency can, however, provide input to the Contractor on a particular staff member's performance. Failure to leave personnel decisions to the Contractor could result in civil rights liability for deprivation of property interest in employment without due process of law. See *Waddell v. Forney*, 108 F.3d 889 (8<sup>th</sup> Cir. 1997); *Chernin v. Lyng*, 874 F.2d 501 (8<sup>th</sup> Cir. 1989).

The Agency does have the ability to notify the Contractor if any of its staff fails to perform their duties in a manner consistent with the Contract. The Contractor will then decide what steps should be taken, if any, to bring the Contractor's performance up to contractual standards. In other words, manage the contract not the person. The Agency also has the right to demand that a particular staff member not be assigned to provide services under the Contract. It is up to the Contractor to decide whether to transfer the employee to another assignment or terminate the employee's employment. If you face any of these issues during the course of the contract, you should consult with the Attorney General's office before taking action.

**16.2 Incorporation of Documents.** The RFP, and amendments and written responses to bidders' questions (collectively RFP) and the Contractor's Proposal submitted in response to the RFP, form the Contract between the Contractor and the Agency and are incorporated herein by reference. The parties are obligated to perform all services described in the RFP and Proposal unless the Contract specifically directs otherwise.

Use this provision only when the Contract is the result of an RFP process. If you used an informal selection process, you may use this provision, but should modify the language to refer to your informal solicitation document instead of the "RFP." If you used a sole source or emergency procurement to select the Contractor, you should delete this provision because there is no RFP or proposal to incorporate into the Contract.

**16.3 Order of Priority.** In the event of a conflict between the Contract, the RFP and the Proposal, the conflict shall be resolved according to the following priority, ranked in descending order: (1) the Contract; (2) the RFP; (3) Proposal.

If this Contract was not the result of a competitive selection process (i.e. you used a sole source or emergency procurement to select the Contractor), remove this provision.

#### **16.4 Compliance with the Law**

The Contractor, its employees, agents, and subcontractors shall comply with all applicable federal, state, and local laws, rules, ordinances, regulations and orders when performing the services under

this Contract, including without limitation, all laws applicable to the prevention of discrimination in employment and the use of targeted small businesses as subcontractors or suppliers. The Contractor, its employees, agents and subcontractors shall also comply with all federal, state and local laws regarding business permits and licenses that may be required to carry out the work performed under this Contract. The Contractor may be required to submit its affirmative action plan to the Department of Management to comply with the requirements of 541 IAC chapter 4.

**16.5 Amendments.** This Contract may be amended in writing from time to time by mutual consent of the parties. All amendments to this Contract must be in writing and fully executed by the parties.

It is important to keep in mind that all changes to the contractual obligations of the parties should be done in writing. There should never be a verbal amendment to a written, integrated contract. If your Contract resulted from an RFP, any amendment must be within the scope of the RFP.

**16.6 Third Party Beneficiaries.** There are no third party beneficiaries to this Contract. This Contract is intended only to benefit the State, the Agency and the Contractor.

Do not delete the third party beneficiaries clause without consulting your attorney. You should also consult your attorney if you think there may be third party beneficiaries that should be considered.

**16.7 Choice of Law and Forum.** The laws of the State of Iowa shall govern and determine all matters arising out of or in connection with this Contract without regard to the choice of law provisions of Iowa law. In the event any proceeding of a quasi-judicial or judicial nature is commenced in connection with this Contract, the exclusive jurisdiction for the proceeding shall be brought in Polk County District Court for the State of Iowa, Des Moines, Iowa. This provision shall not be construed as waiving any immunity to suit or liability including without limitation sovereign immunity in State or Federal court, which may be available to the Agency or the State of Iowa.

Choice of law and forum provisions are important. In this section, the Contract is governed by Iowa law and the forum for the resolution of disputes is the Polk County District Court only. In certain limited circumstances, it may be preferable to provide for resolution of disputes in another Iowa county district court. For example, a local de-categorization contract might provide for disputes to be brought in the district court in a local county because that is where most of the witnesses will be located. In light of Tenth and Eleventh Amendment issues associated with litigation against state agencies in federal court, it is just easier to limit litigation to state courts. If the Contractor insists on the ability to go to federal court, then the following language can be inserted at the end of the second paragraph: "If, however, jurisdiction is not proper in Polk County District Court, the action shall only be brought in the United States District Court for the \_\_\_ District of Iowa, \_\_\_ Division, provided that jurisdiction is proper in that forum." You should not agree to change the terms of this clause without first consulting with the Attorney General's office. Do not remove the language regarding waiver of immunity under any circumstances.

**16.8 Assignment and Delegation.** This Contract may not be assigned, transferred or conveyed in whole or in part without the prior written consent of the other party. For the purpose of construing this clause, a transfer of a controlling interest in the Contractor shall be considered an assignment.

This clause prohibits the Contractor from transferring its obligation under the Contract to someone else without the Agency's consent. If this is important to you that the selected Contractor perform the Contract services, do not change this clause without consulting your attorney.

**16.9 Use of Third Parties.** The Agency acknowledges that the Contractor may contract with third

parties for the performance of any of the Contractor's obligations under this Contract. All subcontracts shall be subject to prior approval by the Agency. The Contractor may enter into these contracts to complete the project provided that the Contractor remains responsible for all services performed under this Contract. All restrictions, obligations and responsibilities of the Contractor under this Contract shall also apply to the subcontractors. The Agency shall have the right to request the removal of a subcontractor from the Contract for good cause.

**16.10 Integration.** This Contract represents the entire Contract between the parties. The parties shall not rely on any representation that may have been made which is not included in this Contract.

**16.11 Headings or Captions.** The paragraph headings or captions used in this Contract are for identification purposes only and do not limit or construe the contents of the paragraphs.

**16.12 Not a Joint Venture.** Nothing in this Contract shall be construed as creating or constituting the relationship of a partnership, joint venture, (or other association of any kind or agent and principal relationship) between the parties hereto. Each party shall be deemed to be an independent contractor contracting for services and acting toward the mutual benefits expected to be derived herefrom. No party, unless otherwise specifically provided for herein, has the authority to enter into any contract or create an obligation or liability on behalf of, in the name of, or binding upon another party to this Contract.

**16.13 Joint and Several Liability.** If the Contractor is a joint entity, consisting of more than one individual, partnership, corporation or other business organization, all such entities shall be jointly and severally liable for carrying out the activities and obligations of this Contract, and for any default of activities and obligations.

**16.14 Supersedes Former Contracts or Agreements.** This Contract supersedes all prior Contracts or Agreements between the Agency and the Contractor for the services provided in connection with this Contract.

**16.15 Waiver.** Except as specifically provided for in a waiver signed by duly authorized representatives of the Agency and the Contractor, failure by either party at any time to require performance by the other party or to claim a breach of any provision of the Contract shall not be construed as affecting any subsequent right to require performance or to claim a breach.

## **16.16 Notice**

Do not let the Contractor notify you by Fax or e-mail.
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**16.16.1** Any and all notices, designations, consents, offers, acceptances or any other communication provided for herein shall be given in writing by registered or certified mail, return receipt requested, by receipted hand delivery, by Federal Express, courier or other similar and reliable carrier which shall be addressed to each party as set forth as follows:

If to the Agency [name and address]:

If to the Contractor [name and address]:

**16.16.2** Each such notice shall be deemed to have been provided:

**16.16.2.1** At the time it is actually received; or,

**16.16.2.2** Within one day in the case of overnight hand delivery, courier or services such as Federal Express with guaranteed next day delivery; or,

**16.16.2.3** Within five (5) days after it is deposited the U.S. Mail in the case of registered U. S. Mail.

**16.16.4** From time to time, the parties may change the name and address of a party designated to receive notice. Such change of the designated person shall be in writing to the other party and as provided herein.

**16.17 Cumulative Rights.** The various rights, powers, options, elections and remedies of any party provided in this Contract, shall be construed as cumulative and not one of them is exclusive of the others or exclusive of any rights, remedies or priorities allowed either party by law, and shall in no way affect or impair the right of any party to pursue any other equitable or legal remedy to which any party may be entitled as long as any default remains in any way unremedied, unsatisfied or undischarged.

**16.18 Severability.** If any provision of this Contract is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of this Contract.

**16.19 Time is of the Essence.** Time is of the essence with respect to the performance of the terms of this Contract.

**16.20 Authorization.** Each party to this Contract represents and warrants to the other parties that:

**16.201** It has the right, power and authority to enter into and perform its obligations under this Contract.

**16.20.2** It has taken all requisite action (corporate, statutory or otherwise) to approve execution, delivery and performance of this Contract, and this Contract constitutes a legal, valid and binding obligation upon itself in accordance with its terms.

**16.21 Successors in Interest.** All the terms, provisions, and conditions of the Contract shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

**16.22 Record Retention and Access.** The Contractor shall maintain books, records and documents which sufficiently and properly document and calculate all charges billed to the Agency throughout the term of this Contract for a period of at least **[three (3) or five (5)]** years following the date of final payment or completion of any required audit, whichever is later. Records to be maintained include both financial records and service records. The Contractor shall permit the Auditor of the State of Iowa or any authorized representative of the State and where federal funds are involved, the Comptroller General of the United States or any other authorized representative of the United States government, to access and examine, audit, excerpt and transcribe any directly pertinent books, documents, papers, electronic or optically stored and created records or other records of the Contractor relating to orders, invoices or payments or any other documentation or materials pertaining to this Contract, wherever such records may be located. The Contractor shall not impose a charge for audit or examination of the Contractor's books and records.

<p>If federal funds are used to pay contract costs, the Contractor must retain its records for five years. If only state funds are involved, three years is sufficient.</p>
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**16.23 Solicitation.** The Contractor warrants that no person or selling agency has been employed or retained to solicit and secure this Contract upon an agreement or understanding for commission, percentage, brokerage or contingency excepting bona fide employees or selling agents maintained for the purpose of securing business.

**16.24 Obligations Beyond Contract Term.** This Contract shall remain in full force and effect to the end of the specified term or until terminated or canceled pursuant to this Contract. All obligations of the Agency and the Contractor incurred or existing under this Contract as of the date of expiration, termination or cancellation will survive the termination, expiration or conclusion of this Contract.

**16.25 Counterparts.** The parties agree that this Contract has been or may be executed in several counterparts, each of which shall be deemed an original and all such counterparts shall together constitute one and the same instrument.

**16.26 Additional Provisions.** The parties agree that if an Addendum, Rider or Exhibit is attached hereto by the parties, and referred to herein, then the same shall be deemed incorporated herein by reference.

**16.27 Further Assurances and Corrective Instruments.** The parties agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for carrying out the expressed intention of this Contract.

**16.28 Delay or Impossibility of Performance.** The Contractor shall not be in default under this Contract if performance is delayed or made impossible by an act of God, flood, fire or similar events. In each such case, the delay or impossibility must be beyond the control and without the fault or negligence of the Contractor. If delay results from a subcontractor's conduct, negligence or failure to perform, the Contractor shall not be excused from compliance with the terms and obligations of this Contract.

**ALTERNATIVE CLAUSE:** You may want to include a provision for voluntary alternative dispute resolution. Here is some language you can use:

Dispute Resolution. Disputes under this Contract may be submitted to voluntary mediation. The Agency will not submit to binding arbitration under any circumstances.

You should not agree to binding arbitration.

The following clauses are often required in contracts funded by federal grants or funds. This list of clauses is not exhaustive. If your Contract is funded by federal money, you should review your grant or contract with the federal government to see if there are any other requirements that are special to your program. For example, a federal program for development of low-income housing would likely require any projects the Agency funds to comply with federal fair housing laws.

**Federal clauses:**

**16.29 Certification regarding sales and use tax.** By executing this Contract the Vendor certifies it is either (a) registered with the Iowa Department of Revenue, collects, and remits "retailer" or a "retailer maintaining a place of business in this state" as those terms are defined in Iowa Code subsections 423.1(42) & (43). The Vendor also acknowledges that the **[name of**

**agency]** may declare the Contract void if the above certification is false. The Vendor also understands that fraudulent certification may result in the **[name of agency]** or its representative filing for damages for breach of contract.

**16.30 Suspension and Debarment.** The Contractor certifies pursuant to 31 CFR Part 19 that neither it nor its principles are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this Contract by any federal department or agency. The Contractor shall execute the certification regarding debarment attached as Exhibit **[enter the number or letter that identifies the exhibit]**.

**“16.31 Lobbying Restrictions.** The Contractor shall comply with all certification and disclosure requirements prescribed by 31 U.S.C. Section 1352 and any implementing regulations and shall be responsible for ensuring that any subcontractor fully complies with all certification and disclosure requirements. The Contractor shall execute the certification regarding debarment attached as Exhibit **[enter the number or letter that identifies the exhibit]**

*[This clause is required if the contract uses funds from a federal contract, grant or cooperative agreement exceeding \$100,000 or is a federal loan commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.*

## **16.32 Tobacco Smoke Prohibited**

**16.32.1** Public Law 103-227, also known as the Pro-Children Act of 1994 (Act), requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted for by an entity and used routinely or regularly for the provision of health, day care, early childhood development services, education or library services to children under the age of 18, if the services are funded by federal programs either directly or through state or local governments, by federal grant, contract, loan or loan guarantee. Federal programs include grants, cooperative agreements, loans or loan guarantees and contracts. The law also applies to children’s services that are provided in indoor facilities that are constructed, operated or maintained with such federal funds. The law does not apply to children’s services provided in private residences; portions of facilities used for inpatient drug or alcohol treatment; service providers whose sole source of applicable federal funds is Medicare or Medicaid; or facilities (other than clinics) where WIC coupons are redeemed. Failure to comply with the provisions of the law may result in the imposition of a civil monetary penalty of up to \$1,000 for each violation and/or the imposition of an administrative compliance order on the responsible party.

**16.32.2** The Contractor certifies that it and its subcontractors will comply with the requirements of the Pro-Children Act of 1994 and will not allow smoking within any portion of any indoor facility used for the provision of services for children as defined by the Act. The Contractor shall execute the Certification of Compliance with the Pro-Children Act of 1994 attached as Exhibit **[enter the number or letter that identifies the exhibit]** and provide the original certification when it executes this Contract. **[the applicable exhibit is attached to this model contract]**

*[The tobacco smoke clause is a federal requirement that applies when federal funds are used to fund the types of programs indicated in the clause. You should include this provision in your contract if it is a federally funded contract or grant for the types of services indicated in the clause.]*

**16.33 Certified Audits.** Local governments and non-profit sub-recipient entities that expend \$300,000 or more in a year in federal awards (from all sources) shall have a single audit conducted for that year in accordance with the provisions of OMB Circular A-133 “Audit of States, Local Governments, and Non-Profit Organizations.” A copy of the final audit report shall be

submitted to the Agency if either the schedule of findings and questioned costs or the summary schedule of prior audit findings includes any audit findings related to federal awards provided by the Agency. If an audit report is not required to be submitted per the criteria above, the sub-recipient must provide written notification to the Agency that the audit was conducted in accordance with Government Auditing Standards and that neither the schedule of findings and questioned costs nor the summary schedule of prior audit findings includes any audit findings related to federal awards provided by the Agency. See A-133 Section 21 for a discussion of sub-recipient versus vendor relationships.

**16.34 Drug Free Work Place.** The Contractor shall provide a drug free workplace in accordance with the Drug Free Workplace Act of 1988 and all applicable regulations. The Contractor shall execute the certification regarding a drug free workplace attached as Exhibit **[enter the number that identifies the exhibit]** and provide the original certificate to the Agency when it executes this Contract. Contractor agrees to abide by the terms of the certification. The certification is a material representation of fact upon which the Agency relied when making or entering into this Contract and any extension or renewal thereof.

*[This language should be included if your Contractor is a sub-recipient and is required to follow the requirements of OMB Circular A-133. The Contractor should familiarize itself with OMB Circular A-133 as this is a provision that the State Auditor's office specifically looks for in qualifying contracts.*

*This language can be added to the Contract Administration section of the Contract.]*

## SECTION 17. EXECUTION

**N WITNESS WHEREOF**, in consideration of the mutual covenants set forth above and for other goods and valuable consideration, the receipt, adequacy and legal sufficiency of which are hereby acknowledged, the parties have entered into the above Contract and have caused their duly authorized representatives to execute this Contract.

The signature block should not appear on a page by itself. You should make sure that a portion of the text of the Contract appears on the page with the signatures.

NAME OF THE AGENCY

By \_\_\_\_\_

NAME OF THE CONTRACTOR

By \_\_\_\_\_

## **Exhibit \_\_\_\_**

### **Certification Regarding Lobbying**

[Use this certification for Contracts, Grants, Loans and Cooperative Agreements]

The undersigned certifies, to the best of his or her knowledge and belief, that:

- ~~A.~~A. No federal appropriated funds have been paid or will be paid on behalf of the Sub-Grantee to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of the Congress, an officer or employee of the Congress, or an employee of a Member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, or the extension, continuation, renewal, amendment, or modification of any federal contract, grant loan or cooperative agreement.
- ~~B.~~B. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of the Congress, or an employee of a Member of Congress in connection with this Contract, grant, loan, or cooperative agreement, the applicant shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its



instructions.

- C. The Contractor shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S.C.A. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Signature: \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Date: \_\_\_\_\_

**Exhibit \_\_\_\_**

**Certification Regarding Lobbying**

[Use this certification for Loan Guarantees and Loan Insurance]

The undersigned certifies, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form – LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Signature: \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Date: \_\_\_\_\_

Most agencies will not ever need to use this alternative certification form.

Exhibit \_\_\_\_

**CERTIFICATION OF COMPLIANCE WITH PRO-CHILDREN ACT OF 1994**

**[Select appropriate type of contractor: Vendors, Grantees, Borrowers]** must comply with Public Law 103-227, Part C Environmental Tobacco Smoke, also known as the Pro-Children Act of 1994 (Act). This Act requires that smoking not be permitted in any portion of any indoor facility owned or leased on contracted by an entity and used routinely or regularly for the provision of health, day care, education, or library services to children under the age of 18, if the services are funded by federal programs either directly or through State or local governments. Federal programs include grants, cooperative agreements, loans or loan guarantees, and contracts. The law also applies to children's services that are provided in indoor facilities that are constructed, operated, or maintained with such federal funds. The law does not apply to children's services provided in private residences; portions of facilities used for inpatient drug or alcohol treatment; service providers whose sole source of applicable federal funds is Medicare or Medicaid; or facilities (other than clinics) where WIC coupons are redeemed.

The **[Contractor, Vendor, Grantee, Borrower]** further agrees that the above language will be included in any sub-awards that contain provisions for children's services and that all sub-grantees shall certify compliance accordingly. Failure to comply with the provisions of this law may result in the imposition of a civil monetary penalty of up to \$1000 per day.

Signature: \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Date: \_\_\_\_\_

## **Exhibit**

### **CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS**

By signing and submitting this Proposal, the bidder is providing the certification set out below:

1. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the bidder knowingly rendered an erroneous certification, in addition to other remedies available to the federal government the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

2. The bidder shall provide immediate written notice to the person to whom this Proposal is submitted if at any time the bidder learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

3. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principle, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this Proposal is submitted for assistance in obtaining a copy of those regulations.

4. The bidder agrees by submitting this Proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

5. The bidder further agrees by submitting this Proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

6. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. A participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Non-procurement Programs.

7. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

8. Except for transactions authorized under paragraph 4 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the federal government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

**CERTIFICATION REGARDNG DEBARMENT,  
SUSPENSION, INELIGIBILITY AND VOLUNTARY  
EXCLUSION—LOWER TIER COVERED TRANSACTIONS**

(1) The bidder certifies, by submission of this Proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.

2 Where the bidder is unable to certify to any of the statements in this certification, such bidder shall attach an explanation to this Proposal.

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(Signature)

(Title)

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(Company Name)

## ADDITIONAL PROVISIONS:

### SECTION X. LIQUIDATED DAMAGES

Many projects are very time sensitive, and liquidated damages for non-performance is one means of addressing this issue. Liquidated damages provisions are contract provisions in which the parties agree upon a stipulated sum to be awarded to the injured party in the event of breach. *Golden Sun Feeds, Inc. v. Clark*, 258 Iowa 678, 683, 140 N.W.2d 158, 161 (1966). They are enforceable only if they are reasonable, which means they must not be “out of reasonable proportion to the loss or injury actually sustained or reasonably to be anticipated.” *Engel v. Vernon*, 215 N.W.2d 506, 516 (Iowa 1974). In addition, liquidated damages provisions are enforceable only when actual damages are impossible or difficult to ascertain. *Sheldon v. Chicago Bonding & Surety Co.*, 190 Iowa 945, 181 N.W. 282 (1921). A court will not enforce a penalty provision.

However, keep in mind that the mere labeling of damages as liquidated and not a penalty is largely irrelevant. *Engel v. Vernon*, 215 N.W.2d 506, 516 (Iowa 1974); *Huntsman v. Eldon Miller, Inc.*, 251 Iowa 478, 101 N.W.2d 531 (1960). If the provision is designed to induce performance by overcompensating the injured party for breach, the provision is unenforceable as a penalty, regardless of whether the provision is labeled as one for liquidated damages or not. *Id.* Nevertheless, the labeling of a provision as liquidated damages performs one useful function—it shifts the burden to the party opposing enforcement of the provision to prove that it is a penalty.

Therefore, the amount of liquidated damages must be reasonable under the circumstances—whatever that means. The greater the amount of liquidated damages means the greater probability that a court would conclude that the payment constitutes a penalty and, therefore, not enforceable. In other words, draft liquidated damages provisions very carefully.

#### X.1 General

**X.1.1** The Agency and Contractor agree that it will be extremely impractical and difficult to determine actual damages, which the Agency will sustain. The goods and services to be provided under the contract are not readily available on the open market; and any breach by the Contractor will delay and disrupt the Agency's operations and will lead to damages. Therefore, the parties agree that the liquidated damages as specified in all the Sections below are reasonable and will remain reasonable as long as the contract is in force.

**X.1.2** In no case shall liquidated damages be measured in terms of potential lost revenue or potential lost net profit to the Agency, unless and to the extent that the Agency determines or alternatively, that a court of competent jurisdiction determines that actual loss can be measured precisely and that the written liquidated damages provision is unreasonable and/or unenforceable as a matter of law.

**X.1.3** Assessment of liquidated damages shall be in addition to and not in lieu of such other remedies as may be available to the Agency. Except and to the extent expressly provided herein, the Agency shall be entitled to recover liquidated damages under each Section applicable to any given incident.

**X.2 Notification of Liquidated Damages.** All assessments of liquidated damages shall be made

by the Agency. Upon determination that liquidated damages are to or may be assessed, the Agency shall notify the Contractor of the assessment in writing.

### **X.3 Conditions for Termination of Liquidated Damages**

**X.3.1** As determined appropriate by the Agency, the following are the conditions under which the Contractor may obtain relief from the continued assessment of liquidated damages that have been imposed.

**X.3.2** Except as waived in writing by the Agency, no liquidated damages imposed shall be terminated or suspended until the Contractor issues a written notice verifying the corrections of the condition(s) for which liquidated damages were imposed and all the Contractor corrections have been subject to verification at the discretion of the Agency.

**X.3.3** If appropriate, the Contractor shall conduct systems testing of any correction as the Agency deems necessary. Such testing shall be developed jointly by the Agency and the Contractor and approved by the Agency including the test script, test environment and the test result.

**X.3.4** The documentation necessary for verification and approval shall be determined by the Agency. The Agency shall be the sole judge of the accuracy of any documentation provided.

**X.3.5** A Contractor notice of correction will not be accepted until the correction is verified by the Agency.

**X.4 Severability of Individual Liquidated Damages.** If any portion of the liquidated damages provisions is determined to be unenforceable in one or more applications, that portion remains in effect in all applications not determined to be invalid and is severable from the invalid applications. If any portion of the liquidated damages provisions is determined to be unenforceable, the other provision or provisions shall remain in full force and effect.

**X.5 Waivers of Liquidated Damages.** It is expressly agreed that the waiver of any liquidated damages due the Agency shall constitute a waiver only as to such liquidated damages and not a waiver of any future liquidated damages. Failure to demand payment of liquidated damages within any period of time shall not constitute a waiver of such claim by the Agency.

**X.6 Payment of Liquidated Damages.** All assessed liquidated damages shall be deducted from any moneys owed the Contractor by the Agency, and in the event the amount due to the Contractor is not sufficient to satisfy the amount of the liquidated damages, the Contractor shall have the damages deducted from subsequent invoices. Recovery of liquidated damages will be accomplished by either invoice deduction, lump sum payment or a combination thereof within thirty (30) days. At the Agency's sole option, the Agency may obtain payment of assessed liquidated damaged though one (1) or more claims upon the Performance Bond supplied by the Contractor.

**X.7 Applicability of Liquidated Damages.** Contractor shall not be required to pay liquidated damages for delays solely due to matters as enumerated in the Section entitled Force Majeure or for time delays specifically approved by the Agency.